No. 17-5716

IN THE
Supreme Court of the United States

TIMOTHY D. KOONS, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

SUMMARY OF THE ARGUMENT

Criminal defendants who provide substantial assistance to the government, and who receive sentences below an otherwise applicable mandatory minimum sentence pursuant to 18 U.S.C. § 3553(e), are eligible for sentence reductions under 18 U.S.C.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* state that no counsel for any party authored this brief in whole or in part, and that no entity or person aside from counsel for *amicus curiae* made any monetary contribution toward the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3(a), *amicus curiae* state that counsel for all parties consented to the filing of this brief.

§ 3582(c)(2). This is so regardless of the procedure used by a sentencing court in any particular case. The relevant statutory and guideline provisions make clear that the sentencing range at the initial sentencing is the offense-specific guideline range (here, USSG § 2D1.1), and not the no-longer-applicable mandatory minimum. When the United States Sentencing Commission ("the Commission") retroactively amends that sentencing range, a reduction under § 3582(c)(2) is appropriate.

Alternatively, assuming that the sentencing range at the initial sentencing is not the offense-specific guideline range, but is instead the guideline sentence under USSG § 5G1.1(b), a reduction under § 3582(c)(2) is still available for § 3553(e) cooperators. This is so because the Commission has provided that the § 3582(c)(2) sentence-reduction analysis must be made "without regard to" § 5G1.1(b). USSG § 1B1.10(c). And for that reason, the "sentencing range" in § 3553(e) cooperator cases has necessarily been lowered via the retroactive reduction to the offense-specific guideline range (here, § 2D1.1).

Finally, a categorical rule permitting § 3582(c)(2) reductions for all eligible § 3553(e) cooperators recognizes that a district court must always consult the offense-specific guideline range when imposing sentence in such a case. This recognition is itself sufficient to find that all § 3553(e) cooperators are initially sentenced based on the offense-specific guideline range (here, § 2D1.1). When that range has subsequently been lowered by the Commission (as § 2D1.1 was here), § 3582(c)(2) permits the district court to reduce the defendant's sentence.

ARGUMENT

I. Section 3553(e) cooperators are eligible for § 3582(c)(2) sentence reductions because such cooperators are not subject to statutorily required mandatory minimum sentences.

In 18 U.S.C. § 3553(e), Congress made clear its intent that criminal defendants who cooperate with the government should be rewarded for that cooperation, even in the teeth of a statutorily authorized mandatory minimum sentence. The provision authorizes a district court, upon motion by the government, to sentence a cooperator below an otherwise applicable mandatory minimum sentence. The framework for the imposition of such a sentence is the United States Sentencing Guidelines (guidelines). 18 U.S.C. § 3553(e) ("Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to [28 U.S.C. § 994]."). Indeed, when it established the Sentencing Commission, Congress provided that the "Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance." 28 U.S.C. § 994(n).

The Commission, in turn, did just that. But to understand how, it is important to understand the structure of the guidelines. The first chapter provides an introduction and general application principles. Importantly, USSG § 1B1.1(a) provides instructions to district courts on how to "determine the sentence and the guideline range" in each case. The first five steps

(of eight) instruct district courts to calculate the defendant's offense level using the various provisions in the first three chapters. USSG § 1B1.1(a)(1)-(5). For instance, in drug cases (like the cases at issue here), a district court begins at USSG § 2D1.1. The § 2D1.1 base offense level is generally set by the type and quantity of drug at issue in the case. USSG § 2D1.1(c). The district court then adjusts the offense level up or down depending on characteristics particular to the offense. USSG § 2D1.1(a)-(e); USSG, Ch. 3.

The sixth step in § 1B1.1(a) instructs district courts to determine the defendant's criminal history category via Chapter Four. USSG § 1B1.1(a)(6). The seventh step instructs district courts to "[d]etermine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above." USSG § 1B1.1(a)(7). In other words, at this step, the district court consults the Sentencing Table, which provides a guideline range based upon the offense level and criminal history category in each case (the offense-specific guideline range). USSG Ch.5, Pt.A.

With this guideline range established, at the eighth step, district courts are instructed to "[d]etermine from Parts B through G of Chapter Five the sentencing requirements and options related to probation [part B], imprisonment [part C], supervision conditions [part D], fines [part E], and restitution [part F]." USSG § 1B1.1(a)(8). In particular, Part G of Chapter Five is geared "to implementing the total sentence of imprisonment." USSG § 5G1.1 addresses "statutorily authorized maximum sentence[s]" and "statutorily required minimum sentence[s]." Section 5G1.1(b) provides that, "[w]here a statutorily *required*

minimum sentence is greater than the maximum of the applicable guideline range, the statutorily *required* minimum sentence shall be the guideline sentence." (emphasis added).

Thus, in the run-of-the-mill case involving a statutory minimum sentence, at step eight, the statutory minimum effectively trumps the guideline range calculated at step seven. But in the § 3553(e) cooperator context, there is no "statutorily required minimum sentence." As explained above, district courts have the authority to sentence § 3553(e) cooperators below any otherwise applicable mandatory minimum sentence. By its plain terms then, § 5G1.1(b) has no application to § 3553(e) cooperators. The guideline range applicable to § 3553(e) cooperators is the range calculated at step seven (USSG § 1B1.1(a)(7)). In this manner, the Commission crafted the guidelines consistently with Congress's directive to the Commission to provide for sentences below the statutory minimum for cooperating defendants, 28 U.S.C. § 994(n). *See also* USSG § 2D1.1, comment. (n.24) (noting, in the drug context, that a "mandatory minimum sentence may be 'waived' and a lower sentence imposed (including a downward departure, as provided in 28 U.S.C. § 994(n), by reason of a defendant's substantial assistance)").

Additionally, after steps seven and eight, § 1B1.1(b) requires district courts to apply "Parts H and K of Chapter Five," as well as any other applicable policy statement within the guidelines. In USSG § 5K1.1, the Commission authorized a downward departure for cooperating defendants, including for § 3553(e) cooperators, USSG § 5K1.1, comment. (n.1). This

provision instructs district courts, upon motion of the government, to "depart from the guidelines." USSG § 5K1.1. Thus, in fulfilling Congress's directive in § 994(n), the Commission has authorized downward departures from the guideline range applicable in cooperator cases (including § 3553(e) cooperator cases).

This Court's precedent generally confirms that a § 3553(e) cooperator's sentencing (or guideline) range has nothing to do with the no-longer-applicable mandatory minimum. *See, e.g., Dorsey v. United States*, 567 U.S. 260, 285 (2012) (noting that § 3553(e) is one of "two mechanisms through which an offender may escape an otherwise applicable mandatory minimum"); *Melendez v. United States*, 518 U.S. 120, 126-129 (1996) (referencing a departure "*from* the applicable Guidelines range" under § 5K1.1, as opposed to the imposition of a sentence "*below* the statutory minimum" under § 3553(e), and not once endorsing a departure "from" the statutory minimum).

And the D.C. Circuit has held as much. *In re Sealed Case*, 722 F.3d 361, 366 (D.C. Cir. 2013) ("granting the § 3553(e) motion freed the district court to use the guideline range and disregard the mandatory minimum"). "The government's substantial assistance motion under 18 U.S.C. § 3553(e) 'waived' the statutory minimum and permitted the district court to impose a lower sentence based on the appellant's applicable guideline range." *Id.* at 368; *see also United States v. Savani*, 733 F.3d 56, 59 (3d Cir. 2013) (noting that, in light of the government's § 3553(e) motion, the district court employed the § 2D1.1 guideline range, and departed further from it, in sentencing one of the defendants).

In sum, Congress directed the Commission to ensure that § 3553(e) cooperators receive sentences below any otherwise applicable statutory minimum sentence. 28 U.S.C. § 994(n); 18 U.S.C. § 3553(e). The Commission did just that by superseding the guideline range with a mandatory minimum only when the mandatory minimum is "required" by statute. USSG § 5G1.1(b). Because a district court is not "required" to impose a mandatory minimum in a § 3553(e) cooperator case, the guideline range in such cases is the offense-specific range calculated at step seven (USSG § 1B1.1(a)(7)). Moreover, under USSG § 5K1.1, a district court can further depart "from the guidelines," even in § 3553(e) cooperator cases.

Under this framework, § 3553(e) cooperators are eligible for sentence reductions under § 3582(c)(2). Here, the retroactive reduction at issue was made to the drug-quantity guideline (USSG § 2D1.1(c)). USSG app. C, amend. 782 (Supp. 2016); USSG § 1B1.10(d) (listing Amendment 782 as retroactive). Thus, § 3553(e) cooperators whose sentencing ranges were based on § 2D1.1(c) are eligible for § 3582(c)(2) reductions. As long as the § 3553(e) cooperator's guideline range has been lowered via the retroactive amendment, the cooperator is eligible for a reduction under § 3582(c)(2). USSG § 1B1.10(b)(1); *see also* USSG § 1B1.10(b)(2)(B) (providing for reductions in cases where a cooperator was sentenced below the applicable guidelines range); USSG § 1B1.10(c) (confirming that § 3553(e) cooperators are eligible for reductions despite an otherwise inapplicable statutory minimum).[2]

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[2] Of course, eligibility is not entitlement. District courts retain discretion to determine the extent, if any, of any authorized

Below, the Eighth Circuit ignored this straightforward approach because of Circuit precedent holding, "[w]hen the district court grants a § 3553(e) substantial assistance motion and grants a substantial assistance departure to a defendant whose guidelines range is entirely below the mandatory minimum sentence, the court must use the mandatory minimum as the starting point." J.A. 52 (citing *United States v. Billue*, 576 F.3d 898, 904-905 (8th Cir. 2009)). But Eighth Circuit precedent incorrectly provides that § 5G1.1(b) applies in § 3553(e) cooperator cases. *Billue*, 576 F.3d at 904. As just explained, by its plain terms, § 5G1.1(b) applies only when there is a "statutorily required minimum sentence." Once the government files its § 3553(e) motion, the district court is not "required" to impose any statutory minimum sentence. 18 U.S.C. § 3553(e); *In re Sealed Case*, 722 F.3d at 368; *see also* USSG app. C, amend. 780 (Supp. 2016), reason for amend. (indicating approval of the approach in *In re Sealed Case*). Thus, § 5G1.1(b) has no application in the § 3553(e)-cooperator context. The applicable guideline range is the offense-specific range calculated at step seven (USSG § 1B1.1(a)(7)), without regard to the no-longer-applicable mandatory minimum.

The Eighth Circuit also cited Circuit precedent for the proposition that any "reduction below the statutory minimum must be based exclusively on assistance-related considerations." J.A. 52 (quoting *United States v. Williams*, 474 F.3d 1130, 1131 (8th Cir. 2007)). From this premise, the Eighth Circuit assumed that the Commission could not set as the starting point in a § 3553(e) cooperator case the

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reduction under the factors listed in 18 U.S.C. § 3553(a). 18 U.S.C. § 3582(c)(2).

offense-specific guideline range calculated at step seven (USSG § 1B1.1(a)(7)), but instead had to use the mandatory minimum as the starting point. J.A. 52. According to Eighth Circuit precedent, "the text of § 3553(e)" requires this latter approach. *Williams*, 474 F.3d at 1131.

The Eighth Circuit relied on § 3553(e)'s title – "Limited authority to impose a sentence below a statutory minimum" – as well as the first sentence of § 3553(e), which provides a court with authority "to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance." *Id.* at 1332. But the "limited authority" referred to in the statute's title most naturally means that a district court's § 3553(e) authority is "limited" to those who provide substantial assistance. In other words, the "authority to impose a sentence below a statutory minimum" is "limited" to those who provide substantial assistance. 18 U.S.C. § 3553(e). The provision's title says nothing more than that.

The first sentence of § 3553(e) merely confirms the point: a district court has the authority to sentence below a statutory minimum "so as to reflect a defendant's substantial assistance." The most natural reading of this phrase, again, is that a district court may impose a sentence below a statutory minimum if the defendant provides substantial assistance to the government. *See, e.g., Caraco Pharm. Lab., Ltd., v. Novo Nordisk A/S*, 566 U.S. 399, 416 (2012) ("the most natural reading of a statute" controls). Had Congress wanted to constrain district courts' consideration of other non-assistance-related factors, it easily could have done so by including additional language (such as

"*only* so as to reflect" or "to reflect *the extent of* a defendant's substantial assistance"). *See, e.g., New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 681 (2010) ("if Congress had intended to authorize two members alone to act for the Board on an ongoing basis, it could have said so in straightforward language").

This Court's decision in *Melendez* provides further support. *Melendez* held, consistent with § 3553(e)'s text, that a district court cannot impose a sentence below a statutory minimum under § 3553(e) without a government motion invoking § 3553(e). 518 U.S. at 125-126. *Melendez* did not hold that § 3553(e)'s first sentence provided any additional *Congressional constraint on district courts* at sentencing. Instead, *Melendez* held that the second sentence in § 3553(e) (requiring any sentence below a statutory minimum to be imposed in accordance with the guidelines) directed *the Commission to constrain* a district court's discretion at sentencing. *Id.* at 128-129.[3]

Moreover, while *Melendez* recognized that § 5K1.1 "may guide the district court when it selects a sentence below the statutory minimum," *Melendez* did not hold that § 5K1.1 was the *only* guide in such circumstances. *Id.* at 129-130. Nor did *Melendez* imply (let alone hold) that the Commission was required to set the starting point for any § 3553(e) reduction at a point consistent with the (no-longer-applicable) mandatory minimum. Rather, a guidelines scheme that sets a § 3553(e) cooperator's guideline range at step seven, USSG § 1B1.1(a)(7), without applying § 5G1.1(b), is

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[3] *Melendez* was decided in 1996, almost a decade prior to this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). Although not relevant here, we doubt that the Commission can "constrain" sentencing courts in this context post-*Booker*.

consistent with *Melendez*'s further indication that the government must file an additional § 5K1.1 motion, in addition to the § 3553(e) motion, in order to authorize a sentence below the offense-specific guideline range. 518 U.S. at 131. In other words, the § 3553(e) motion gets the sentence to the guideline range, whereas an additional § 5K1.1 motion gets the sentence below that range. *See id.*

For all of these reasons, § 3553(e) cooperators are eligible for § 3582(c)(2) sentence reductions. Because the Eighth Circuit held otherwise, this Court should reverse.

II. Alternatively, § 3553(e) cooperators are eligible for § 3582(c)(2) sentence reductions under USSG § 1B1.10(c).

As just explained, the Eight Circuit is wrong to require district courts in § 3553(e) cooperator cases to use the no-longer-applicable mandatory minimum (or § 5G1.1) to calculate the guideline range. But even if not, § 3553(e) cooperators are still eligible for § 3582(c)(2) sentence reductions in light of USSG § 1B1.10(c). The relevant provisions related to retroactive guideline amendments confirm the point.

In 28 U.S.C. § 994(o), Congress authorized the Commission to "review and revise" the guidelines. Section 994(p) directs the Commission to "submit to Congress amendments to the guidelines" each year ("not later than the first day of May"). 28 U.S.C. § 994(p). Such amendments typically take effect on November 1 of that year, "except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress." *Id.* Under 28 U.S.C. § 994(u), "[i]f the Commission reduces the

term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses," the Commission has the authority to apply the amendment retroactively to "prisoners serving terms of imprisonment for the offense." *See also* 28 U.S.C. § 994(a)(2) (directing the Commission to draft a policy statement to implement § 3582(c)(2)).

The Commission has amended the guidelines over 800 times, with 29 amendments made retroactive to already-sentenced prisoners. *See* USSG § 1B1.10(d) (listing the retroactive amendments). The amendment at issue here, Amendment 782, was made retroactive by the Commission. *Id.* The amendment applies to drug trafficking offenses. USSG app. C, amend. 782, reason for amend. It generally reduces by two levels the offense levels assigned to the various drug quantities tabled at § 2D1.1(c). *Id.* To paraphrase § 994(u), the Commission reduced the term of imprisonment recommended in the guidelines applicable to drug trafficking offenses, and made the reductions retroactive to prisoners serving terms of imprisonment for drug trafficking offenses.

Section 3582(c)(2) recognizes the Commission's authoritative role in retroactive sentence reductions. To be eligible for a reduction, the defendant's sentence must have been "based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o)." 18 U.S.C. § 3582(c)(2). And any reduction must be "consistent with applicable policy statements issued by the Sentencing Commission." *Id.* The applicable policy statement is USSG § 1B1.10. This policy statement binds district courts. *Dillon v. United States*, 560 U.S. 817, 830 (2010). "[Section] 3582(c(2) requires the

[district] court to follow the Commission's instructions in § 1B1.10 to determine the prisoner's eligibility for a sentence modification and the extent of the reduction authorized." *Id.* at 827.

In 2014, at the same time the Commission retroactively reduced the guidelines applicable to drug trafficking offenses (§ 2D1.1), the Commission amended § 1B1.10 to ensure that § 3553(e) cooperators were eligible for § 3582(c)(2) sentence reductions. Section 1B1.10(c) expressly provides that, in § 3553(e) cooperator cases, "the amended guideline range shall be determined without regard to the operation of § 5G1.1." Thus, even assuming that § 5G1.1 applies at the initial sentencing in § 3553(e) cooperator cases, the Commission has instructed that such cooperators are nonetheless eligible for § 3582(c)(2) sentence reductions because § 5G1.1 does *not* apply in § 3582(c)(2) proceedings. *See also* USSG app. C, amend. 780 (Supp. 2016), reason for amend. (listing as an example a cooperator whose guideline range fell entirely below the inapplicable mandatory minimum, like the petitioners here, and explaining that this defendant would be eligible for a § 3582(c)(2) sentence reduction).

Section 1B1.10(c), which binds the district courts, and which Congress implicitly approved of, is enough to resolve this case. *United States v. Williams*, 808 F.3d 253, 261 (4th Cir. 2015). Section 1B1.10(c) "dictates eligibility for § 3582(c)(2) relief." *Id.* at 260. Either § 5G1.1(b) is not applied at sentencing, and a § 3553(e) cooperator is eligible for a § 3582(c)(2) reduction (as explained in Section I above), or § 5G1.1(b) applies at sentencing, and a § 3553(e) cooperator is eligible for a § 3582(c)(2) reduction

because § 1B1.10(c) directs that § 5G1.1(b) is disregarded in the § 3582(c)(2) context.

The Eighth Circuit below acknowledged as much. J.A. 50-51. But the Eighth Circuit nonetheless held that the petitioners were ineligible for reductions because of what it termed § 3582(c)(2)'s "threshold question" – "whether each [petitioner] was sentenced 'based on a sentencing range that has subsequently been lowered by the Sentencing Commission.'" J.A. 51. In so holding, the Eighth Circuit did not rest its decision on any application of § 5G1.1(b) at the initial sentencing, but instead on the application of the (no-longer-applicable) mandatory minimum at the initial sentencing. J.A. 52 ("If § 5G1.1(b) did not exist, the district court would still have set these defendants' sentences at the mandatory minimum before considering a substantial assistance departure.").

The Eighth Circuit's decision is incorrect for three reasons. First, as a practical matter, a district court never sets § 3553(e) "sentences at the mandatory minimum," J.A. 52, because § 3553(e), by its own terms, does away with the mandatory minimum. Second, the Eighth Circuit's analysis ignores the second sentence in § 3553(e), which requires the district court to impose any sentence following a § 3553(e) motion "in accordance with the guidelines." A district court that "sets [a defendant's] sentence[] at the mandatory minimum," J.A. 52, has not imposed sentence "in accordance with the guidelines," 18 U.S.C. § 3553(e). And third, if "§ 5G1.1 did not exist," as the Eighth Circuit assumed, J.A. 52, there would be no feasible way in which to construe the guidelines to require a district court to set the "sentences at the mandatory minimum," *id.* It is only at § 5G1.1 that a

district court is instructed to consider a "statutorily required minimum sentence."

The Eighth Circuit was also wrong to criticize the Commission for ignoring this Court's decision in *Freeman v. United States*, 564 U.S. 522 (2011), when it added section (c) to § 1B1.10. J.A. 54-56. Section 1B1.10(c) applies to cooperators. *Freeman* involves defendants who enter into Rule 11(c)(1)(C) agreements (whether cooperators or not). 564 U.S. at 525. Those two things are not the same. The Rule 11(c)(1)(C) context is different because it involves a "bargain struck between prosecutor and defendant." *Id.* at 531. Rule 11(c)(1)(C) allows the parties to agree to a "specific sentence or sentencing range," and nothing within Rule 11(c)(1)(C) requires an agreed-upon sentence or sentencing range to contemplate the guidelines. Fed.R.Crim.P. 11(c)(1)(C); *see also Freeman*, 564 U.S. at 549 (Roberts, C.J., dissenting) ("The reality is that whenever the parties choose a fixed term, there is no way of knowing what that sentence was 'based on.'"). But here, § 3553(e) requires district courts to sentence cooperators "in accordance with the guidelines." Moreover, nothing within § 1B1.10 addresses Rule 11(c)(1)(C) agreements. In contrast, § 1B1.10(c) expressly addresses § 3553(e) cooperators.

To apply *Freeman*'s holding (whatever it is)[4] beyond the Rule 11(c)(1)(C) context, and to use it to ignore § 3553(e)'s plain text, as well as a binding policy statement directly on point (and not disapproved of by Congress) is a stretch too far. This is particularly true in light of this Court's previous recognition that, when

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[4] This Court has granted certiorari to revisit *Freeman* (or at least clarify its holding) in *Hughes v. United States*, No. 17-155.

Congress has instructed the Commission to promulgate a particular requirement, the "number of steps the Commission employs to achieve that requirement is unimportant." *United States v. LaBonte*, 520 U.S. 751, 761 (1997). The requirements here are three-fold: (1) to ensure that the guidelines reward § 3553(e) cooperators with lower sentences, 28 U.S.C. § 994(n); (2) to amend the guidelines when warranted, 28 U.S.C. § 994(o); and (3) to determine whether any such amendments should be made retroactive, 28 U.S.C. § 994(u). The Commission took the appropriate steps to achieve these requirements by: (1) limiting the application of § 5G1.1(b) to statutorily required minimum sentences; (2) promulgating § 5K1.1; (3) retroactively reducing the guidelines applicable to drug trafficking offenses; and (4) eliminating § 5G1.1(b) from the retroactivity analysis under § 1B1.10(c) in order to ensure that § 3553(e) cooperators convicted of drug trafficking offenses are eligible for § 3582(c)(2) reductions.

These steps fit comfortably with § 3582(c)(2)'s text, which predicates sentence reductions upon both the existence of a retroactive guideline amendment and consistency with the Commission's applicable policy statements. *Dillon*, 560 U.S. at 827. If a district court ignores § 5G1.1(b) (as it should) and originally sentences a § 3553(e) cooperator based on his offense-specific guideline range, § 3582(c)(2) relief will be available if the Commission later retroactively lowers that range. But even if a district court originally sentences a § 3553(e) cooperator based on § 5G1.1(b), § 3582(c)(2) relief will still be available upon a later retroactive guideline amendment, given the Commission's instruction (via § 1B1.10(c)) to ignore

§ 5G1.1(b) when determining the cooperator's amended guideline range. Either way, categorically, § 3553(e) cooperators are eligible for § 3582(c)(2) reductions.

III. Alternatively, § 3553(e) cooperators are eligible for § 3582(c)(2) sentence reductions because district courts necessarily consult the offense-specific guideline range at sentencing.

If this Court is not yet convinced that § 3553(e) cooperators are eligible for § 3582(c)(2) reductions, one additional consideration should tip the scales in petitioners' favor: when sentencing § 3553(e) cooperators, § 3553(e)'s plain text requires district courts to impose sentence "in accordance with the guidelines." As with sentencings in general, "district courts *must* begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Peugh v. United States*, 569 U.S. 530, 541 (2013) (emphasis in original) (quoting *Gall v. United States*, 552 U.S. 38, 50 n.6 (2007)). "The Guidelines provide a framework or starting point—a basis, in the commonsense meaning of the term—for the judge's exercise of discretion." *Freeman*, 564 U.S. at 529 (plurality opinion). "Even where the judge varies from the recommended range, if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real sense a basis for the sentence." *Id.* (citations omitted).

The *Freeman* plurality correctly applied these principles to the § 3582(c)(2) context.

> [Section 1B1.10] seeks to isolate whatever

> marginal effect the since-rejected Guideline had on the defendant's sentence. Working backwards from this purpose, § 3582(c)(2) modification proceedings should be available to permit the district court to revisit a prior sentence to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence or to approve the agreement. This is the only rule consistent with [§ 1B1.10], a [binding policy] statement that rests on the premise that a Guideline range may be one of many factors that determine the sentence imposed.

Id. at 530. These principles apply with even more force in the § 3553(e) cooperator context. This issue involves criminal defendants who readily admitted guilt and who provided substantial assistance to the government. *See, e.g.*, USSG app. C, amend. 759, reason for amend. (noting that the "guidelines and the relevant statutes have long recognized that defendants who provide substantial assistance are differently situated than other defendants and should be considered for a sentence below a guideline or statutory minimum even when" non-cooperating defendants are still subject to the guideline or statutory minimum). To permit § 3582(c)(2) reductions only where the district court at the initial sentencing ignored § 5G1.1(b) and instead used the § 2D1.1 guideline range "would permit the very disparities the Sentencing Reform Act seeks to eliminate," *Freeman*, 564 U.S. at 533, and which § 1B1.10(c) *in fact* eliminates.

For these reasons, it is particularly appropriate for

this Court to hold that all § 3553(e) cooperators are eligible for § 3582(c)(2) sentence reductions. In such cases, the sentencing court's sentence is not just "likely to be based on the Guidelines," *Freeman*, 564 U.S. at 534, but is instead *required* to be based on the guidelines, 18 U.S.C. § 3553(e). "This straightforward analysis would avoid making arbitrary distinctions between similar defendants based on the [district court's initial sentencing procedure]. And it would also reduce unwarranted disparities in federal sentencing, consistent with the purposes of the Sentencing Reform Act." *Freeman*, 564 U.S. at 534.

As we read *Freeman*, eight Justices thought a categorical rule should apply to § 3582(c)(2) eligibility in the Rule 11(c)(1)(C) context. The four-Justice plurality concluded that the district court was required to consider "the relevant sentencing range" in every case, "even if the defendant and prosecutor recommend a specific sentence as a condition of the guilty plea." 564 U.S. at 530. In contrast, the four dissenting Justices concluded that "the sentence imposed under a Rule 11(c)(1)(C) plea agreement is based on the agreement, not the Sentencing Guidelines." 564 U.S. at 544 (Roberts, C.J., dissenting). The plurality and the dissent agreed that the concurrence's case-by-case approach was "arbitrary and unworkable." *Id.* The recent grant in *Hughes* confirms the point. *See* n.4, *supra*.

If a categorical approach is in order (and we think it is), the only plausible approach is the one that deems all § 3553(e) cooperators eligible for sentence reductions under § 3582(c)(2). That approach aligns with § 3553(e) and § 3582(c)(2)'s plain text, § 1B1.10(c)'s express terms, and the authority

delegated by Congress to the Commission in 28 U.S.C. §§ 994 (n), (o), and (u). A contrary categorical rule, excluding all § 3553(e) cooperators from § 3582(c)(2) sentence reductions, would exclude even those § 3553(e) cooperators who were sentenced exclusively with reference to their § 2D1.1 guideline ranges, *see In re Sealed Case*, 722 F.3d at 366-368, an implausible result under the applicable statutes and provisions. And a case-by-case approach, permitting § 3582(c)(2) sentence reductions for some § 3553(e) cooperators but not others, would create unwarranted disparities and produce an arbitrary and unworkable standard for the lower courts. Section 3553(e) cooperators (like petitioners) are eligible for § 3582(c)(2) sentence reductions. The Eighth Circuit erred in holding otherwise.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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